Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–90–1993
JAMES FOONG J
14 APRIL 1995

Tort *— Vicarious liability — Accident caused on defendant's premises — Alleged negligence of driver of unnumbered lorry — Whether presumption arises that lorry belonged to defendant — Whether could presume driver was defendant's servant or agent*

Evidence *— Presumption — Evidence Act 1950 s 114 — Whether court could make presumption that lorry on defendant's premises belonged to defendant and driver was defendant's servant — Whether burden of proof had shifted from plaintiff to defendant to rebut presumption — Evidence Act 1950 s 114*

Civil Procedure *— Pleadings — Parties to action bound by own pleading — Plaintiff did not plead issue of occupiers' liability — No material facts to express elements of occupiers' liability — Whether court could make findings on that issue in trial*

Civil Procedure *— Pleadings — Necessity for express pleadings — Contributory negligence not pleaded — Whether court could apportion liability*

Damages (Personal Injury or Death) *— Fatal accident — 'Lost years' — Accident happened in 1979 — Administrators and dependants of deceased sued for loss of future earnings — Claim not specifically pleaded — Whether judge could award claim as pre-trial loss under special damages — Civil Law Act 1956 s 8*

Tort *— Occupiers' liability — Duty to trespasser — Test to be applied*

In 1979, a lorry carrying out earth dumping activities at the appellants' work site collided into one Mezlan bte Nasib ('the deceased'), when she was crossing the site to her nearby home. The lorry bore no registration number, but the lorry driver had made a police report soon after the accident. The administrators and dependants of the deceased ('the respondents') sued the appellants as the owners of the lorry and employer of the driver. They made an estate claim pursuant to s 8 of the Civil Law Act 1956 in the sessions court. The appellants admitted that an accident occurred at their work site on that particular day, but contended that the deceased was a trespasser, and denied that the lorry was owned by them or driven by their servant/agent. The sessions court judge found in favour of respondents and made the presumption that if the driver of the lorry was found on the appellants' premises, the lorry he was driving must have belonged to the appellants, and that the driver must be their servant and/or agent; and as the appellants had failed to rebut this presumption, they were vicariously liable. It was further held that the appellants were also liable as occupiers of the premises to the deceased who was a trespasser, because though they were aware of the likelihood of trespassers entering onto the premises where the earth work was

carried on, they failed to take measures to prevent them from entering it. The sessions court judge then awarded apportionment of liability on a 50:50 basis. A sum of RM60,000 was awarded as a pre-trial loss under special damages for the lost years. The appellants appealed against liability and damages. On the issue of quantum, it was contended that a claim for lost years could not be awarded as a pre-trial loss, when it was not specifically pleaded by the respondents.

Held, allowing the appeal:

(1) Although s 114 of the Evidence Act 1950 grants the court the discretion to presume the existence of any fact which it thinks likely to have happened, the discretion must be exercised judiciously and not arbitrarily. There must be a proper basis for arriving at such a presumption, ie the connection between the evidence tendered and the presumption relied on must not be too remote, too uncertain or offend any legal principles.

(2) In this case, there was no legal basis for the sessions court judge to make presumption. The connection between an unnumbered lorry and the presumption that it must had belonged to the appellants, and that the lorry driver was their servant and/or agent, was extremely remote and uncertain. Without this presumption, the burden of proof was on the respondents to prove that the driver was negligent and that he was a servant and/or agent of the appellants at that time.

(3) In order to hold the appellants liable as occupiers, the respondents must plead in the statement of claim a cause of action and all the material facts of occupiers' liability. The respondents' failure to do so had taken the appellants by surprise when the claim against them was settled on occupiers' liability. As the respondents had only pleaded negligence, they were bound by their own pleadings, and hence, the sessions court's findings on the issue of occupiers' liability could not be sustained.

(4) The case on which the sessions court judge relied in coming to her decision to apportion liability had already been overruled. Furthermore, in accordance with the present law, the apportionment of liability cannot be granted, as contributory negligence was not pleaded by the respondents.

Obiter:

(1) As the accident occurred in 1979, the law applicable in respect of quantum was the pre-amendment Civil Law Act 1956 ('the Act'). An award for the 'lost years' was based on loss of working years and had to be awarded when proved. Under the estate claim by the respondents pursuant to s 8 of the Act, it was preferable for the sessions court judge to make the award in respect of the claim for lost years under general damages. However, no injustice was done for the award to be placed under

special damages as a pre-trial loss, though it was not specifically pleaded under this category. A

(2) The test applicable in deciding whether an occupier is liable to a trespasser for loss or damages caused while on the premises is a subjective test based on the occupiers' knowledge of the danger on his premises and his ability to take preventive measures according to his own financial limitations. B

[Bahasa Malaysia summary

Pada tahun 1979, sebuah lori yang sedang menjalankan kerja melambak tanah di tapak kerja perayu telah melanggar seorang yang C bernama Mezlan bte Nasib ('si mati') apabila beliau sedang merentasi tapak kerja itu menuju ke rumahnya. Lori itu tidak mempunyai nombor pendaftaran tetapi pemandu lori telahpun membuat laporan polis sejurus selepas kemalangan itu. Pentadbir dan orang tanggungan si mati ('responden') telah mendakwa perayu sebagai pemunya lori itu dan majikan pemandunya. Mereka telah membuat tuntutan bagi D pihak harta pusaka si mati di bawah s 8 Akta Undang-Undang Sivil 1956 di mahkamah sesyen. Perayu mengaku bahawa suatu kemalangan telah berlaku di tapak kerja mereka pada hari tersebut, tetapi menegaskan bahawa si mati adalah seorang penceroboh, dan menafikan bahawa lori itu adalah kepunyaan mereka atau dipandu E oleh pekerja/agen mereka. Hakim mahkamah sesyen bersetuju dengan responden dan membuat anggapan bahawa jika pemandu lorry dijumpai di premis perayu, lori yang dipandunya mestilah kepunyaan perayu, dan pemandu itu juga merupakan pekerja/agen perayu; dan oleh kerana perayu tidak mematahkan anggapan ini, perayu F menanggung liabiliti secara vikarius. Hakim mahkamah sesyen juga memutuskan bahawa perayu sebagai penghuni menanggung liabiliti terhadap si mati yang merupakan seorang penceroboh, kerana sungguhpun mereka sedar akan kemungkinan penceroboh memasuki premis mereka di mana kerja tanah dijalankan, mereka gagal mengambil langkah untuk menghalang si mati daripada memasuki G premis mereka. Hakim mahkamah sesyen kemudiannya mengagihkan liabiliti pada dasar 50:50. Wang sejumlah RM60,000 juga diawardkan kepada responden sebagai kerugian pra-perbicaraan di bawah ganti rugi khas, berkenaan dengan tuntutan responden untuk 'tahun yang hilang'. Perayu membuat rayuan terhadap liabiliti dan ganti rugi. Mengenai isu quantum, perayu telah berhujah bahawa tuntutan H untuk 'tahun yang hilang' tidak boleh diawardkan sebagai kerugian pra-perbicaraan apabila ia tidak dinyatakan dalam pliding secara spesifik.

Diputuskan, membenarkan rayuan tersebut: I

(1) Walaupun s 114 Akta Keterangan 1950 memberikan mahkamah budi bicara untuk menganggap kewujudan sebarang fakta yang ia fikir mungkin berlaku, budi bicara tersebut hendaklah dilaksanakan secara bijak dan bukan secara sembarangan. Dasar

yang betul untuk membuat anggapan seperti itu harus wujud, iaitu hubungan antara keterangan yang dikemukakan dengan anggapan tersebut tidak boleh terlalu renggang, menimbulkan keraguan atau bercanggahan dengan sebarang prinsip undang-undang.

(2) Dalam kes ini, tidak terdapat asas undang-undang bagi mahkamah sesyen membuat anggapan. Hubungan antara lori yang tidak bernombor dan anggapan bahawa ia mestinya kepunyaan perayu, serta bahawa pemandu lori itu semestinya merupakan pekerja dan/atau agen perayu, adalah amat renggang dan menimbulkan keraguan. Tanpa anggapan ini, beban bukti adalah terletak pada responden untuk membuktikan bahawa pemandu lori adalah cuai dan bahawa beliau adalah seorang pekerja/agen perayu pada masa itu.

(3) Supaya perayu berliabiliti sebagai seorang penghuni, responden mesti menyatakan kausa tindakannya dan semua fakta material yang berkaitan dengan liabiliti penghuni dalam penyataan tuntutan mereka. Kegagalan responden untuk berbuat demikian telah memeranjatkan perayu apabila tuntutan terhadap mereka diputuskan berdasarkan liabiliti penghuni. Oleh kerana plaintif hanya membangkitkan isu kecuaian dalam pliding, mereka adalah terikat kepada pliding mereka sendiri, dan dengan itu, keputusan mahkamah sesyen berkaitan dengan isu liabiliti penghuni tidak boleh dikekalkan.

(4) Kes yang digunakan oleh hakim mahkamah sesyen dalam mencapai keputusannya berkenaan dengan pengagihan liabiliti telahpun ditolak. Di samping itu, mengikut undang-undang sekarang, pengagihan liabiliti tidak boleh dibuat kerana soalan kecuaian sertaan tidak ditimbulkan oleh responden dalam pliding.

Obiter:

(1) Oleh kerana kemalangan ini berlaku pada tahun 1979, undang-undang yang terpakai berkenaan dengan kuantum adalah Akta Undang-Undang Sivil 1956 ('Akta itu') sebelum pindaan. Sesuatu award untuk 'tahun yang hilang' adalah berdasarkan kehilangan tahun bekerja dan ia mesti diawardkan apabila terbukti. Berhubungan dengan tuntutan harta pusaka oleh responden menurut s 8 Akta itu, adalah lebih baik jika hakim mahkamah sesyen membuat award untuk tuntutan tahun yang hilang di bawah ganti rugi umum. Walau bagaimanapun, tiada ketidakadilan yang berlaku kerana award itu diberikan di bawah ganti rugi khas sebagai kerugian pra-perbicaraan, sungguhpun ia tidak dinyatakan secara khas di bawah kategori itu dalam pliding.

(2) Ujian yang terpakai untuk memutuskan sama ada seseorang penghuni mempunyai liabiliti terhadap seorang penceroboh atau tidak untuk kerugian atau kerosakan yang diakibatkan apabila penceroboh itu berada di premis tersebut adalah suatu ujian

subjektif yang berdasarkan pengetahuan penghuni tentang bahaya yang wujud di premisnya dan kemampuannya untuk mengambil langkah berjaga-jaga mengikut had kewangannya.]

Notes

For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed) paras 691–729; [1989] Mallal's Digest 1508; [1993] Mallal's Digest 1299–1300.

For a case on the presumption under s 114 of the Evidence Act 1950, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1307.

For a case on parties to an action being bound by their pleadings, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2631.

For cases on the necessity for express pleadings, see 2 Mallal's Digest (4th Ed, 1994 Reissue) paras 2613–2629.

For cases on claims for 'lost years' in fatal accidents, see 6 *Mallal's Digest* (4th Ed) paras 304–308; [1992] Malall's Digest 856–858.

For cases on the duty owed by occupiers to trespassers, see 12 *Mallal's Digest* (4th Ed) paras 624–629.

Cases referred to

Berry v British Transport Commission [1961] 1 QB 306; [1961] 3 All ER 65; 3 WLR 450 (folld)

British Railways Board v Herrington [1972] 1 All ER 749; [1972] 1 WLR 537 (folld)

Fox v H Wood (Harrow) Ltd [1962] 2 QB 601; 2 All ER 1100; [1962] 3 WLR 1513 (folld)

Gantret v Egerton (1867) LR 2 CP 371 (folld)

Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630 (folld)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (folld)

Lembaga Letrik Negara, Malaysia v Ramakrishnan [1982] 2 MLJ 128 (folld)

Mohamed Ali v PP [1962] MLJ 230 (folld)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324 (distd)

Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358 (refd)

Sim Guan Soon & Anor v Khoo Ting Hong & Anor [1968] 2 MLJ 203 (not folld)

Southern Portland Cement Ltd v Cooper [1974] 1 MLJ 194 (folld)

West Rand Central Gold Mining Co v R [1905] 2 KB 391 (folld)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (folld)

Legislation referred to

Civil Law Act 1956 s 8

Evidence Act 1950 s 114

Occupiers' Liability Act 1984 [Eng]

KG Ong (*Samad & Yap*) for the appellants.

RK Nathan (*RK Nathan & Co*) for the respondents.

James Foong J: This is an appeal against the decision of the learned sessions court judge at Kajang, delivered on 29 December 1992.

The appellants in this appeal were the defendants in a civil action, brought by the respondents (plaintiffs) who were claiming as administrators and dependants to the estate of one Mezlan bte Nasib ('the deceased'). In the statement of claim filed by the respondents, the following were alleged:

> (3) On 7 October 1979, at or around 10.15am, Mezlan bte Nasib, the deceased, was lawfully at the defendants' working site at Project Taman Mukim Ampang II, Selangor when a motor lorry, owned and negligently driven by the defendants' servant and/or agent violently collided into the deceased, who died as a result. The said collision was solely caused by the negligence of the defendants' servant and/or agent.
>
> Particulars of negligence
>
> Operating and reversing the said motor lorry without due regard to the presence and safety of the deceased. In the circumstances failing to exercise reasonable diligence, care and skill.

The appellants, in their defence, though admitting that an accident occurred at their work site on that particular day, contended that the deceased was a trespasser, and denied that the motor lorry involved was owned by them or driven by their servant and/or agent.

The only material witness called upon to testify for the respondents on the issue of liability was SP1. He stated that at the material time, he and his mother (the deceased) were carrying zinc sheets across the appellants' work site to their nearby home. On the site, there were vehicles carrying out earth dumping activities. SP1 was walking ahead of the deceased and when he heard a sound of zinc sheets being knocked over, he turned and saw the deceased underneath a motor lorry which bore no registration number.

The learned sessions court judge, in her judgment in favour of the respondents, identified two issues relating to liability. First, whether the motor lorry which collided into the deceased belonged to the appellants, and was driven by their servant and/or agent at the material time. Secondly, whether the deceased was a trespasser on the appellants' premises at time of accident.

On the first issue, the learned sessions court judge found the motor lorry to belong to the appellants, and that it was driven by the appellants' servant and/or agent at the material time. She based this finding on the grounds that since the driver of the motor lorry was on the appellants' premises, the burden of proof shifted from the respondents to the appellants to prove that the said vehicle did not belong to the appellants, and that it was not driven by the appellants' servant and/or agent when it collided into the deceased; since the appellants have failed to prove otherwise, the presumption was not rebutted.

Though not expressed in specific terms, by implication, the learned sessions court judge had assumed the existence of a presumption that if the driver of a motor lorry is found on premises, the lorry he was driving must

have belonged to the owner of the said premises ('the owner'), and that the driver was a servant and/or agent of the owner, and unless rebutted by the owner, any negligent act caused by such driver is attributed vicariously to that of the owner. This conclusion is exceedingly far-fetched, overextended and devoid of legal foundation. In the warning words of Devlin LJ in *Berry v British Transport Commission* [1962] 1 QB 306 at p 327; [1961] 3 All ER 65 at p 75; [1961] 3 WLR 450 at p 463, 'if they [presumptions] are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own'.

Section 114 of the Evidence Act 1950 allows the court to:

> ... presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

However, this discretion granted to the court must be exercised judiciously and not arbitrarily. It must, according to Ong J (as he then was) in *Mohamed Ali v PP* [1962] MLJ 230 [at p 232]:

> ... not be drawn automatically, or as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised ...

Therefore, there must be a proper basis for arriving at a presumption, and in order to do so, the connection between the evidence tendered and the presumption relied on must not be too remote and uncertain. It should also not offend any legal principles (see *Sarkar on Evidence* (14th Ed) at p 1507). These principles are essential and must be strictly complied with, for it is a general rule that once a presumption is established, the burden lies on the defendant to rebut it. For this, it is wise to heed the words of Devlin LJ again, in *Berry v British Transport Commission* [1962] 1 QB 306 at p 327; [1961] 3 All ER 65 at p 75; [1961] 3 WLR 450 at p 463, where he stated that:

> ... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable — in the sense that 'estoppel are ordious and the doctrine should never be applied without a necessity for it' ... .

From the evidence adduced by the respondents in this case, there was absolutely no proper foundation for the presumption as expounded by the learned sessions court judge to exist. The driver of the motor lorry which collided into the deceased was identified. He made a police report soon after the accident, and which report was included in the agreed bundle of documents used during trial. When this fact was known, the solution was for the respondents to prove negligence against this particular driver. If vicarious liability against the appellants was to be established, then there should be evidence tendered to show that that particular driver was at that material time a servant and/or agent of the appellants. The connection of an unnumbered motor lorry on the appellants' premises to the presumption that it must have belonged to the appellants, and that whoever drove it was

a servant and/or agent of the respondents, is extremely remote and uncertain. The vehicle could have belonged to anyone and been driven onto the appellants' premises illegally, just like the deceased coming onto the appellants' work site. Similarly, the identified driver could have been the owner of the motor lorry, or an employee of another person. Thus, the connection between the evidence as tendered and the presumption drawn by the learned sessions court judge was very remote and uncertain, culminating in the conclusion that it was founded without legal basis. Bereft of this presumption, the burden of proof, like in all negligence cases, is always upon the plaintiff (the respondents) making the allegation to establish each and every element of tort; such burden has not shifted onto the appellants. From the appeal records, this court is of the opinion that there is no evidence tendered by the respondents which implicate the appellants with the alleged negligence.

On the second issue, the learned sessions court judge first made a finding that the deceased was a trespasser on the appellants' premises at the material time. She then proceeded to conclude that since the appellants were aware of earth works on their premises and the likelihood of trespassers entering onto their land, they were liable to injuries and damage caused to such trespassers, especially when they failed to take reasonable preventive measures, like putting up warning signs. Various passages from the text of the *Practical Approach to Assessment of Liability* by Mr RK Nathan were quoted, and in the end, she concluded that based on the case of *Sim Guan Soon & Anor v Khoo Ting Hong & Anor* [1968] 2 MLJ 203, which facts are relatively similar to the present case, liability should be apportioned on a 50:50 basis.

To begin with, the principles in *Sim Guan Soon*'s case have since been overruled by the case of *British Railways Board v Herrington* [1972] 1 All ER 749; [1972] 1 WLR 537. Secondly, apportionment of liability cannot be granted when contributory negligence was not pleaded by the appellants — see the case of *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630.

In any event, this particular issue involves two matters. First, whether a cause of action based on occupiers' liability has been pleaded, and the other, whether the elements for such a cause of action have been fulfilled in order for such a claim to succeed. From the written judgment by the learned sessions court judge, there seems to be a confusion as to what the present state of law relating to trespassers injured or suffering damages while on the premises of an occupier is. Old principles were quoted, while those existing seem to be misunderstood. It is best, for the sake of good order and clarity to elaborate a little on this aspect of the law.

Before 1972, in the case of *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358, Lord Hailsham LC laid down the law as follows:

> ... The trespasser comes onto the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some

> act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard to the presence of the trespasser.

However, all these seem to have changed to a more humane approach after the case of *British Railways Board v Herrington* was decided. In this case, the House of Lords found the British Railways Board which operated an electrified railway line liable to a six-year-old plaintiff who walked over a broken fence, trespassed onto the railway track and was severely burned by the live line. As aptly expressed by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *Lembaga Letrik Negara Malaysia v Ramakrishnan* [1982] 2 MLJ 128 at p 131:

> In *Herrington*'s case there were five separate speeches and amidst such a bewildering array of tests with their imprecisely defined terms, it is difficult to express precisely the ratio decidendi of the case ...

Nevertheless, the Federal Court in *Lembaga Letrik Negara* accepted the legal principles in *Herrington,* and that of the Privy Council decision of *Southern Portland Cement Ltd v Cooper* [1974] 1 MLJ 194, which made similar emphasis, and summarized the legal principles relating to this aspect of the law to be as follows [at p 131]:

> In summary, then, the duty owed to trespassers arises when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

What is essential in this legal principle to our present case is the creation of the subjective test based on the occupier's knowledge, ability and resources. Though this subjective test has been changed to an objective approach by the English Occupiers' Liability Act 1984, of which Malaysia does not have such a piece of legislation, the Malaysian courts are still bound by the decision of *Lembaga Letrik Negara* under the 'unbreakable stranglehold of stare decisis'. Be it the subjective or objective test, one of the important elements for a plaintiff to prove his case in a situation of this nature, is to plead material facts that can imply the occupier having knowledge, ability and resources. Failure to do so could cost the plaintiff not succeeding in his claim. With this in mind, this court shall next proceed to examine the pleadings.

The primary function of the statement of claim is to plead reasonable cause of action against the defendant. Therefore, it must contain all material facts on which the plaintiff relies for his claim. It must also disclose the legal liability of the defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant. Thus, in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must set out showing the existence of a duty to take reasonable care owed to the particular person or class of person and that the duty was disregarded — see the judgment of Wallis J

in *Gantret v Egerton* (1867) LR 2 CP 371, which was adopted in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391. Further, in claims where subjective knowledge of the defendant is to be implicated, such as they 'ought to know' or 'ought to have known', material facts relating to such matters must be pleaded — see the case of *Fox v H Wood (Harrow) Ltd* [1963] 2 QB 601; [1962] 2 All ER 1100; [1962] 3 WLR 1513.

In the present case before this court, the respondents only alleged that the deceased was lawfully on the appellants' premises, and a motor lorry belonging to the appellants and driven by their servant and/or agent collided into the deceased resulting in her death. There were no material facts pleaded to express the deceased was a trespasser, and that the appellants occupying the premises were aware, or ought to know of the likelihood that trespassers such as the deceased would venture upon their land, where activities created by appellants thereon could endanger her. Further, no material facts were disclosed to the effect that in accordance with the dictates of common humanity, and in the light of the appellants' own circumstances and financial limitations, relevant steps were taken to prevent such danger from happening. Without such basic material facts being set out in the statement of claim, the appellants were taken by surprise that the claim against them was based on a course of action settled on occupiers' liability. From what was stated in the statement of claim, the appellants were only to answer a charge of negligence caused by a lorry alleged to have belonged to them and driven by one of their servants and/or agents. The appellants were never called upon to answer a claim based on occupiers' liability. Their defence alleging the deceased being a trespasser was purely to traverse the allegation of the respondents that the deceased was lawfully on the appellants' land. This assertion by the appellants of the deceased being a trespasser could not be taken to have opened the floodgate to allow the respondents to include a cause of action under occupiers' liability. As the plaintiffs are bound by their own pleadings, their case is only confined to the issues and questions raised therein. Since the issue of occupiers' liability was never pleaded, the findings of the learned sessions court judge on this point cannot be sustained. It is appropriate here to reiterate the oft-quoted passage of Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 [at p 196], which found support in the Supreme Court case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 to illustrate this point. It is as follows:

> The court is not entitled to decide a suit on a matter which no issue has been raised by the parties. It is not the duty of the court to make a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial suit should be confined to the pleas on which the parties are at variance.

Based on the reasons above, this court finds the learned sessions court judge has erred in her application of legal principles, and as such, this appeal should be allowed with costs.

Before concluding, it would be in good order for this court to decide on an issue raised in this appeal regarding quantum. The question before this court is whether a claim for lost years can be awarded as a pre-trial loss, when it is not specifically pleaded. As the accident in this case occurred in 1979, the law applicable in respect of quantum is the pre-amendment Civil Law Act 1956. The amendment under Act A602 only came into effect on 1 October 1984. Under the estate claim by the respondents pursuant to s 8 of the pre-amendment Civil Law Act 1956, the learned sessions court judge awarded a sum of RM60,000. This she arrived at as follows:

(1) the retirement age of the deceased should be based on 55 years;

(2) the deceased at the time of death was 40 years of age;

(3) for contingency, five years purchase was taken out leaving a multiplicand of 10 years;

(4) the deceased's loss of income was RM500 per month;

(5) the formula thus used was 500 x 12 x 10 = RM60,000; and

(6) this RM60,000 was awarded as pre-trial loss since the trial took 13 years after the accident to complete in 1992.

The appellants now argued that this sum cannot be awarded, since it was not specifically pleaded as a pre-trial loss. In support, the appellants' counsel tendered the Federal Court case of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324. The respondents' counsel, on the other hand, argued that in a case involving a claim for lost years where the deceased is dead, it makes no difference whether it is awarded under special or general damages; *Underwood*'s case above and other authorities gazing on this point relate to claims by plaintiffs who were alive when making their claim for future loss, and not like in this case involving the earnings of a person who is dead. I am in total agreement with the respondents' counsel on this matter. In a case where the plaintiff is claiming under s 8 of the pre-amendment Civil Law Act 1956 due to the loss of a deceased, the award is based on loss of working years. Therefore, it makes no difference whether it should be awarded under special or general damages since it has to be awarded when proved. The learned sessions court judge chose to award under this head of special damages, for she felt that the award based on 10 years' purchase was well before the pre-trial period of 14 years, which took this case to finality in the subordinate court in 1992. Though it is preferable to make this award under general damages, no injustice was done for the award to be placed under special damages, though not specifically pleaded under this category.

Appeal allowed.

Reported by Isabel Liong